Justifications and Excuses: A Systematic Approach

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Professor Baron uses a linguistic approach in her paper, examining the meaning, or various meanings, of "to justify."[1] Professor Baron also tells us which meaning she prefers for which reasons.

I believe the linguistic approach is inappropriate for addressing the issues the juxtaposition "justification or excuse" poses today. A glance at the Oxford English Dictionary reveals that the word "to justify" is derived from the Latin "*justificare*," meaning "*justum facere*"—"to make just." The OED also notes that the word is "Christian Latin." Reading that strengthened my long-held suspicion that we have the word "to justify" from the Apostle Paul's justification doctrine, or more precisely from its Latin translation. Words like "*justificare*" and "*justificatio*" were later transported from the language of theology to the language of moral philosophy. I am not exactly sure when that happened, but I think Luis de Molina, who lived in the sixteenth century, is responsible. At any rate, it seems certain that the word was imported into the language of moral philosophy during the Spanish late Scholastic period. Grotius later used the expression "*causa justifica*"—"justifying cause."[2] Following Grotius, the natural law theorists of the Enlightenment spoke of "*justificare*," and so it was that the expressions entered the language of criminal law theory.

Molina certainly intended to express something sensible when he used the words "*justificare*" and "*justificatio*." Still we need to ask whether transporting theological expressions also imported fully unnecessary problems into moral theory—problems we now have merely because we use these words. I would like to avoid these problems to the extent possible, and would thus like to take a different approach from Professor Baron's. I shall call mine a "systematic approach," meaning that I intend first to describe the problems we indeed do have before I would agree to any linguistic analysis. The substantive issues that need to be resolved cannot be resolved by the linguistic approach.

I. PROSPECTIVE AND RETROSPECTIVE PERSPECTIVES

In this analysis, I am proceeding from a system of rules that includes only norms of prohibition and norms of permission. Consequently, I will not deal with norms of requirement and their exceptions. Essentially Professor Baron does the

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1 Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005).

2 GROTIUS, DE JURE BELLI AC PACIS, II., Cap. I, § I, no. 1 (1625).

same. I would first like to differentiate between the prospective and the retrospective, and shall begin with the prospective.[3]

In the prospective, a very clear relationship exists between norms of prohibition and norms of permission. This relationship is defined by saying that the propositions "*a* is prohibited" and "*a* is permitted" are contradictories. It is in this sense that the word "*permissum*" is used as early as in Accursius' *Glossa Ordinaria*.[4] Kant[5] and other eighteenth century authors were aware of this meaning, and twentieth century authors, such as Kalinowski,[6] used this meaning as well in their work on deontic logic. The contradictory nature of "*a* is prohibited" and "*a* is permitted" indicates that norms of prohibition and norms of permission are located on the same logical level within any single normative system. The relationship between these two norms, therefore, can be understood as the relationship between rules and exceptions to those rules. Prohibitions provide the rules, and permissions provide the exceptions.

I would also like to distinguish between two types of judgments, namely descriptive and normative judgments. Descriptive judgments report the relevant facts; normative judgments subsume these facts under the relevant norms. To use R.M. Hare's example, "The strawberries are red, juicy, and sweet" is a descriptive judgment, and "The strawberries are good" is a normative judgment.[7]

The distinction between descriptive and normative judgments permits us to draw a distinction between the definitional and evaluative parts of a norm. The definitional part of a norm describes the category of relevant acts. The evaluative part contains the determination of whether the act is prohibited or is permitted.

I would further like to distinguish between two levels, namely the ought level and the can level. First as to the ought level. The application of norms of prohibition and norms of permission in concrete situations leads to statements such as "You ought not to do [a specific act] *a*!" or "You may do [a specific act] *a*!" These statements should not be confused with the norms of prohibition and norms of permission themselves, which at first blush seem so similar, but which are formulated *abstractly*: "Killing is prohibited" ("Thou shalt not kill!"). The ought level, on the other hand, is concerned with the *application* of these norms in concrete situations, such as the situation in which A is about to shoot B and I call to him: "You ought not to kill—don't do it!"

The ought level and the can level are connected through the old saw "*Impossibilium nulla obligatio*!" ("As to the impossible there is no obligation!").[8]

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[3] On this difference, see Joachim Hruschka, *Verhaltensregeln und Zurechnungsregeln*, 22 RECHTSTHEORIE 449 (1991).

[4] Gloss "Adstringitur" on C.2.4.34.

[5] IMMANUEL KANT, METAPHYSIK DER SITTEN, VOL. VI, 222, lines 27–29 (Akademie-Ausgabe 1907) (1797).

[6] GEORGES KALINOWSKI, INTRODUCTION A LA LOGIQUE JURIDIQUE 124 (1965).

[7] RICHARD M. HARE, THE LANGUAGE OF MORALS 111 (1964).

[8] CELSUS, D. 50.17.185.

Rephrased: "'ought' implies 'can'." That is an assumption any speaker makes when he uses propositions on the ought level in the *lingua recta*. One who says "Close the door!" assumes and implies in the *lingua recta* that the addressee of this imperative has the ability to close the door. It is not only "ought," however, but also "may" which implies "can." As is true of old saws, they are often imprecise or incomplete.

The old saw "*Impossibilium nulla obligatio*!" is imprecise and incomplete in another respect as well. Celsus should at least have said "*Impossibilium et necessariorum nulla obligatio*!" "Ought" and "may" not only imply "can" but also imply that the action in question is not a matter of natural necessity. In other words, the prospective application of a system of rules from the viewpoint of the person applying those rules implies the contingency of the (future) commission or omission of an action to which the system of rules is being applied.

Finally, I distinguish between the objective observer (in the first instance that is I myself) and the person who is about to commit or omit a certain action. Distinguishing between the objective observer and the agent permits me to compare the observer's judgments to the agent's. If the judgments do not correspond, we speak of the agent's "mistake." The agent can err in his descriptive or in his normative judgments. Assume that A is about to shoot B. I can then say: "That is a human being at which A is shooting," whereas A thinks: "That is a tree at which I am shooting." In this case A errs as to the relevant circumstances surrounding the act, meaning in his descriptive judgment. In contrast, A could recognize the relevant circumstances but still make a relevant mistake. I say: "A may not shoot B!" whereas A thinks: "I may shoot!" A then errs on the normative judgment level. The objective observer never errs. Instead, his judgments provide the standard for determining whether the agent judges correctly or mistakenly. If you say that I am mistaken, then you place yourself on the level of the objective observer in my stead.

Length restrictions have required me to say quite a bit in very few words. I would like to use even fewer words to capture the retrospective. In the retrospective, the offense definitions combined with the evaluation that the act is "unlawful" correspond to the prospective norms of prohibition. Hence the statement: "One who killed another human being has acted unlawfully!" corresponds to the prohibition against killing ("Thou shalt not kill!"). At home, I would call the retrospective norms that correspond to the norms of permission "justificatory norms." Here I shall call them "norms of exception." In the retrospective, norms of exception correspond to the definitions of exceptions combined with the evaluation that the act is "not unlawful." Accordingly, the norm of exception: "One who injured another human being in a self-defense situation when the injury was necessary to ward off an attack did not act unlawfully!" corresponds to the norm of permission, "In a self-defense situation, you may injure the assailant if necessary to ward off the attack!"

Two levels must be distinguished in the retrospective as well. In the retrospective, the application of the offense definitions and the exceptions

combined with the evaluation "did (or did not) act unlawfully!" corresponds to the ought level in the prospective. Retrospectively applying these norms to an act implies that the act has been imputed to the actor. Imputing the act means *inter alia* that the agent acted "freely." Assuming that an act was free is merely the retrospective equivalent of assuming in the prospective that "ought" and "may" imply the contingency of the required or permitted act.

II. MISTAKES AND THEIR SIGNIFICANCE

In light of these preparatory comments, I would now like to discuss two cases that Professor Baron also discusses. The first case is easy.

> *A shoots B in a self-defense situation. Killing the assailant was necessary to save A's life. A is aware of all the relevant circumstances surrounding his act.*

In solving this case I am assuming a system of norms which, on the one hand, prohibits homicide and, on the other, permits homicide as an exception in self-defense situations. I call this system of rules "law."

A did not act unlawfully, either from the objective observer's viewpoint or from A's own viewpoint. Admittedly, A did fulfill the offense definition that corresponds to the prohibition against homicide, and that initially indicates that A's act is unlawful. Nonetheless, the definition of an exception that corresponds to the permission to kill if necessary in self-defense is applicable as well. That is the reason why A did not act unlawfully. The killing of an assailant might be unfortunate, but it is as unlawful as the killing of a fly.

This case is a case in which the agent's judgment corresponds to the objective observer's judgment regarding the relevant circumstances surrounding the act. The next case is a case in which the two judgments do not correspond.

> *C injures D because C thinks D is attacking him, which, from the objective observer's viewpoint, is false. If the situation were as C believes it is, his act would be within the limits of lawful self-defense. Accordingly, C falsely assumes that circumstances exist which would fulfill the requirements of a definition of an exception.*

The solution to this case appears at first impression to be the following: From the objective observer's viewpoint, the act and situation are such that the observer must judge the act to be prohibited (unlawful), meaning that circumstances exist which fulfill an offense definition (definition of prohibition), and it is not the case that circumstances exist that fulfill the definition of any exception. In contrast, from the agent's viewpoint it is not the case that the act and the situation are such that the act is to be judged as prohibited. To be sure, the agent does recognize that

circumstances exist which fulfill the definition of a prohibition, but he falsely assumes that circumstances also exist which fulfill the definition of an exception.

Here the issue is raised whether the agent's perceptions are relevant at all, and if they are, why that is so. It may seem obvious that they are relevant, but it is far from self-evident. The question is also not easy to answer. Our case is one of a system of cases that we need to view as a whole before we can attain consistent solutions. In particular, we need to examine four types of mistake cases.

1. The cases in which the actor does not recognize that circumstances exist which are relevant under an offense definition. Example: Driver D does not realize that he is about to hit a pedestrian and injure him.
2. The cases in which the actor falsely assumes that circumstances exist which are relevant under an offense definition. Example: E shoots at a tree and thinks he is shooting at a human being.
3. The cases in which the actor falsely assumes that circumstances exist which are relevant under the definition of an exception to a prohibition. Example: F falsely assumes he is being attacked with deadly force and shoots the assailant, which is the only means available to ward off the assumed attack.
4. The cases in which the actor does not recognize that circumstances exist which are relevant under the definition of an exception to a prohibition. Example: G kills V out of revenge, but, unbeknownst to G, V was about to kill him, and would have, had G not killed V.

The question arises for the first case group whether D's unknowing injury of the pedestrian is less wrong than the knowing injury, or alternatively not wrong at all. If we answer this question in the affirmative, then we emphasize, in addition to the objective, the subjective aspect of the act. That is precisely what we do in the Western world. Ever since Aristotle required that an actor know the relevant circumstances in order to assume his act was *free*,[9] we have declared that the subjective aspect of the act is relevant. Consequently, in the first case group, the unknowing injury of another human being is less wrong than the knowing injury, or perhaps not wrong at all.

This determination has an effect on the cases in the second case group. Aristotle's commentator Aquinas once wrote: "*Eiusdem est ligare et solvere.*" ("Binding and releasing are two sides of the same coin").[10] Accordingly, if not knowing the circumstances surrounding an act that are relevant under an offense definition works to the actor's benefit, then falsely assuming such circumstances

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[9] ARISTOTLE, NICOMACHEAN ETHICS, III.3; III.1 (Sarah Broadie & Christopher Rowe eds. & trans., Oxford Univ. Press 2002).

[10] THOMAS AQUINAS, DE VERITATE, q. 17, a. 3, o.4 (Raymundi Spiazzi ed., 1964).

must work to his detriment. That is the reason why we would convict E of a (completed) attempt to commit the act that he believed himself to be committing.

Having made it this far in the analysis, we can see the solution to the cases in the third and fourth case groups easily. Because the definitions of the exceptions are on the same logical level as the offense definitions, mistakes regarding the circumstances that are relevant under a definition of an exception must be treated in the same way as mistakes regarding circumstances that are relevant under a definition of an offense.

I shall not discuss the problems raised by the fourth case group, but instead will concentrate on the third group of cases in which the agent falsely assumes the existence of circumstances that are relevant under a definition of an exception. Since we must treat these cases in the same way as we treat the cases in which the actor lacked knowledge of circumstances relevant under an offense definition, then we must say at least initially that the act cannot be imputed to the actor as a free act. Initially not imputing the act to the actor as his free act does not exclude imputing it to him in a second step of the analysis. We impute it to him as a free act in a second step of the analysis if we are of the opinion that the actor was responsible for his mistake. The actor is responsible for his mistake if we could have expected him to avoid the mistake and he failed our expectations. If the actor was responsible for his mistake, we say that his act was negligent, just as we say that an act was negligent when the actor did not recognize the circumstances relevant under an offense definition and was responsible for making the mistake.

With that as background, it appears that Professor Baron would like to say an actor is "justified" in two very different groups of cases: 1) in the case in which the actor recognizes all of the relevant circumstances and acts in a real situation of self-defense, and 2) in the case in which the actor falsely assumes that circumstances exist which would make his act an act of self-defense and was not responsible for making this mistake. At least that is my explanation of what "reasonable" is supposed to mean. I take it that the actor "reasonably" assumes that circumstances exist which fulfill the definition of an exception when it is not the case that he is responsible for his mistake.

I think I understand why the actor is supposed to be "justified" in both cases. According to Ulpian, justice is the constant and lasting will to honor everyone's rights.[11] Justice is thus a characteristic of the subject. An actor can be just and remain just even if he sometimes acts in violation of the system of conduct rules. Aristotle said the same. Not only in the real cases of self-defense, but also in the mistake cases, assuming that the actor was not responsible for the mistake, the actor is and remains a just person. In the situation in which he (subjectively) finds himself, he is in this sense "justified."

Although I think I understand why Professor Baron argues as she does, that does not mean I can agree with her. The problem is that her analysis does not help us any further. It merely shows us how unfortunate it was that Molina introduced

[11] ULPIAN, D.1.1.10.

the word "*justificare*" into moral theory. This unfortunate occurrence causes us unnecessary problems.

At debate in criminal law and moral theory under the rubric "justifications and excuses" is the distinction between conduct rules and rules of imputation. Conduct rules (the prospective norms of prohibition and norms of exception, and their retrospective correspondents) relate to the ought level. The rules of imputation are supposed to have a distinct purpose. In the retrospective they correspond to the can level in the prospective. The system of rules of imputation is complicated. I would only like to mention in passing that two levels of imputation must be distinguished, and that I would use the expression "excuses" for those rules that exclude imputation on the second level.[12]

When we use the word "justification" in a technical sense, we refer to norms of exception within the system of conduct rules seen in the retrospective. Professor Baron does not use "justification" in this technical sense. Still that does not mean we cannot continue to use the expression "justification" in this way. In criminal law we do not speak of justice as a characteristic of a person. Instead we are concerned with whether an act was unlawful or not. Justifications play a key role in that determination.

[12] For further discussion, see Joachim Hruschka, *Imputation*, 1986 BYU L. REV. 669.